BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ALEXANDER G. BURGHART	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,053,105
KEY STAFFING	)	
Respondent	)	
AND	)	
	)	
PACIFIC EMPLOYERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the April 6, 2011, Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders (ALJ). Claimant was awarded medical treatment under the care of Dr. Bradley Poole as the authorized treating physician after the ALJ determined that claimant had suffered personal injury by accident which arose out of and in the course of his employment with respondent.

Claimant appeared by his attorney, Robert R. Lee of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Gary R. Terrill of Overland Park, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held April 6, 2011, and the documents filed of record in this matter.

ISSUE

Did claimant's accidental injury arise out of and in the course of his employment with respondent? Respondent contends that claimant's slip and fall on the wet floor in respondent's lobby occurred as claimant was on break, going to join his wife. The purpose of the meeting was to sign documents related to their personal bank accounts. Claimant

argues that the meeting was very short, during his 20-minute break, and claimant never left respondent's premises. Plus, respondent's floor was wet, which was why claimant fell.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Hearing Order should be affirmed.

The facts of this matter are not in dispute. Claimant worked for Key Staffing (respondent) on the fifth floor of the Docking State Office Building performing clerical work. He worked for the Kansas Department of Social and Rehabilitation Services in its Children and Family Services Division. Claimant was on his authorized 20-minute break on August 25, 2010, and was walking across the first floor lobby of respondent's building when he slipped and fell on a wet floor. Claimant was going to meet his wife at the building's north entrance to sign personal banking documents at the time of the accident. Claimant acknowledged that he normally used the front entrance of the building when he arrived at work and when he left at the end of the day. The north entrance was being used that day to meet his wife, as she was parked outside the north entrance. Claimant did use the north entrance occasionally when coming and going.

All entrances to the building are the property of the State of Kansas and are used almost exclusively by state employees or by persons having business with the State of Kansas. Building security staff offered to call an ambulance for claimant, but claimant declined, as his wife is a nurse at Stormont-Vail HealthCare and she was willing to drive claimant to the emergency room.

Claimant worked an 8-hour day, five days per week, for a total of 40 hours per week. He was allowed two 20-minute breaks, one in the morning and one in the afternoon, and a 30-minute lunch. Claimant, on many occasions, did not take his allowed breaks. Claimant could also vary his work hours, going in at 6:30 a.m. on occasion and at 8:00 a.m. on others. As long as he worked the required 8-hour day, there did not appear to be any restrictions as to the exact hours he worked.

On the day of the accident, claimant had just started his morning break when the fall occurred. Claimant did not tell anyone that he was taking a break. But, that was not required. Claimant had scheduled the meeting with his wife at 10:00 a.m. He rode down the elevator from the 5th floor to the main lobby and walked toward the north entrance when the accident occurred. The floor was wet due to normal maintenance as a worker was using a floor cleaning machine to clean the floor. Claimant slipped as he attempted to walk around the wet portion of the floor.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[4]

> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.[5]

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee

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[1] K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2010 Supp. 44-501(a).

[4] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[5] K.S.A. 2010 Supp. 44-501(g).

> occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.[6]

The "going and coming" rule in K.S.A. 44-508(f) is generally applied when analyzing cases involving a claimant either going to work at the beginning of the day or leaving work at the end of the day or shift. The Board has applied the "going and coming" rule, as well as the premises exception to that rule, when analyzing whether lunch-break injuries are compensable.[7] However, the case at bar does not include a lunch break. This break, a shorter coffee or rest break, is generally treated differently. Such breaks benefit both the employer and the employee and injuries that occur during those breaks are considered compensable.[8]

Larson's Workers Compensation Law, Ch. 21 (2006) states:

> Employees who, within the time and space limits of their employment engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdiction, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

This general rule, known as the personal comfort doctrine, recognizes that ministering to personal comfort is conduct that is typically considered an incident of employment. Activities that are incidents of employment are considered to arise "out of" the employment. This Board Member does not find that claimant's personal errand was so unusual or unreasonable that his actions took him outside the incidents of his employment.

Additionally, this accident would also be deemed compensable as it occurred due to the conditions of respondent's premises. Claimant slipped on the wet floor, which was wet due to the normal maintenance activities in the building. The accident and resulting

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[6] K.S.A. 2010 Supp. 44-508(f).

[7] *Curless v. Southern Education Counsel*, No. 233,051, 1998 WL 847163 (Kan. WCAB Nov. 4,1998).

[8] Larson's Workers' Compensation Law § 13.05(4) (2006); *Wallace v. Sitel of North America*, No. 242,034, 1999 WL 1008023 (Kan. WCAB Oct. 28, 1999).

injury occurred during normal working hours, and was caused by the condition of respondent's premises.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied his burden of proving that he suffered personal injury by accident which arose out of and in the course of his employment with respondent. The award of temporary benefits in this instance is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders dated April 6, 2011, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May, 2011.

HONORABLE GARY M. KORTE

c: Robert R. Lee, Attorney for Claimant
Gary R. Terrill, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge

[9] K.S.A. 44-534a.